

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Establishment of Rules and)
Policies for the Digital Audio)
Radio Satellite Service in the)
2310-2360 MHz Frequency Band)

IB Docket No. 95-91
GEN Docket No. 90-357
RM No. 8610
PP-24
PP-86
PP-87

RECEIVED
OCT 13 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

REPLY OF DIGITAL SATELLITE
BROADCASTING CORPORATION

DOCKET FILE COPY ORIGINAL

Submitted By

Digital Satellite Broadcasting Corporation

W. Theodore Pierson, Jr.
Exec. V.P. and General Counsel

Pierson & Tuttle
Suite 560
1200 19th Street, N.W.
Washington, D.C. 20036

(202) 466-3044 (Voice)
(202) 466-3055 (Fax)
Its Counsel

Douglas J. Minster
V.P. Corporate Development
Digital Satellite Broadcasting Corporation
Suite 560
1200 19th Street, N.W.
Washington, D.C. 20036

October 13, 1995

(202) 296-7160 (Voice)
(202) 466-3055 (Fax)

No. of Copies rec'd
List ABCDE

AT

SUMMARY

In the telecommunications arena, necessity truly is the mother of invention. This is nowhere more true than in Satellite DARS.

There can be no doubt that the necessity to maximize revenues will drive the DARS licensees to uncover a whole new generation of listeners. There can be no doubt that the necessity to convince skeptical financiers to spend billions before there is a single subscriber will drive the DARS licensees to maximize the distance between themselves and broadcasters. These logical conclusions are well-substantiated by the record evidence.

Necessity also has been the mother of invention for the broadcast lobbyists -- but with dramatically different (and pernicious) results. The broadcast lobbyists have produced pounds of studies that are remarkable not only for their weight but for their invention. The broadcast lobbyists' sound and fury, in their own words, has produced:

- o An interminable "theoretical" analysis of adverse impact from DARS that its proponent (SPR) is finally forced to admit is "speculative and involve[s] a certain, irreducible degree of uncertainty;"
- o The SPR "study" is also remarkable for its chutzpa -- faced with the extraordinary burden of proving "**by strong evidence**" that there will be "**a significant net reduction in service[s]**," what does the NAB present? -- a carefully-biased set of "interviews" with a handful of their own, six station managers (out of more than 11,000 broadcasters);
- o And what final proof does SRA presume to submit? -- "The simplest and best explanation" that DARS is a "threat" to "radio broadcasters" is "the strong opposition to satellite DARS by radio broadcasters" who "perceive" DARS as a competitive threat. In simpler terms, DARS must be presumed to harm us because we say so.
- o The SPR "study" sets a new standard for self-serving evidence that would try even Judge Ito's evidentiary tolerance;
- o The other NAB submissions, while not so blatantly unreliable, are in the end

based upon equally unreliable speculations and false assumptions.

o For instance, the NAB's method of counting the number of local stations includes scores of stations that are licensed to distant communities; and NAB's method of counting stations with ethnic diversity includes scores of formats that are presented only an hour or two out of an entire week.

o The Kagan study, while seemingly containing more intellectual heft, also reaches conclusions that simply cannot be accepted because of demonstrably incorrect assumptions.

(1) Kagan assumes that the impact from DARS will be immediate, an assumption that clearly is false;

(2) Kagan assumes that broadcasters will take no remedial action, an assumption that logic and 60 years of vigorous counteraction belies;

(3) Kagan assumes that broadcasters will react to any loss of revenue by cutting their local programming, an assumption that:

(a) is never proven by quantifiable data;

(b) is belied by testimony from an Enid, Oklahoma broadcaster (submitted by the NAB itself) that he realizes a gross margin of 50% on local sports programming; and,

(c) defies logic -- why would broadcasters reduce the only type of programming that DARS licensees could never offer?

And what about the countervailing evidence? What evidence is in the record from the only objective, unbiased sources -- the listening public and their representatives? There are pro-DARS comments from more than 52 groups representing millions of radio-disenfranchised citizens. The scope and number of demographic groups testifying that conventional radio's technology has failed them is completely unprecedented in Commission annals and conclusively demonstrates that early initiation of DARS is in the public interest.

The NAB has a last desperate stratagem up its sleeve, however. After years and pages of doomsaying, in evident recognition that: (1) the evidence; (2) Commission and

court precedent (Direct Broadcast Satellites, for one example); and, (3) the unanimous consensus across economic and political boundaries that new entrants must be welcomed and expedited consigns their case to failure, the broadcast lobbyists completely abandon the logic and substance of their case to date. In one final and extreme example of legerdemain, the NAB urges, indeed insists, that the Commission open the doors wide to dozens of DARS licensees, by reopening the proceeding and auctioning the DARS spectrum.

In this case, at least, the identity of the messenger is the best proof of the reliability of the message. Apart from the unprecedented unfairness to the DARS applicants -- who have been expending millions of dollars for over three years in reliance on the Commission's past promises -- the NAB's argument dramatically demonstrates its poverty.

Whatever else may be said of the broadcast lobbyists, they are not fools. They would never dare suggest that the Commission welcome additional DARS applicants and auctions unless they were dead certain that such action would lead to interminable delay. The NAB knows, as surely as we do, that DARS auctions are illegal and will lead to years of controversy and judicial appeals and intervention -- that, of course, is their objective, one that this Commission must find is completely unacceptable.

The record in this case is now closed. The broadcast lobbyists have been given numerous opportunities to plead their case, and the radio-disenfranchised have finally been given theirs. There is no question that the evidence weighs heavily in favor of early initiation of DARS, even without giving recognition to the extraordinary burden of proof on the opponents of DARS.

The Commission must proceed to process the applications of the existing four applicants as quickly as possible. At the same time it should, as it has in every other satellite service since the dawn of the domestic satellite industry, adopt minimal service rules:

- o A single service classification for DARS would be impossible to administer and defeat DARS promise;
- o A prohibition on advertising is unnecessary and similarly self-defeating;
- o Voluntary, but not coerced, sharing among DARS licensees of spectrum and coordinated technical operations is well-precedented and in the public interest;
- o The Commission has sensibly recognized in other services that the marketplace should govern economic survival -- there is no reason to depart from that learning in DARS and impose significant financial qualification standards;
- o Precedent (in the DBS situation), the wisdom painfully gained from years of frustrating administration and the ultimate futility of such obligations counsels against imposition of any so-called "public interest" programming obligations;
- o Twenty-five years of unbroken precedent in the domestic satellite arena cautions against imposing any technical rules (including preordained modulation schemes) beyond those absolutely necessary to prevent interference.

As the Chairman recently stated, it is time to "let DARS compete with terrestrial. Every instinct tells me that the results of that competition will be better radio service for the American public. And there is no reason to assume that radio will do poorly in this competition."

TABLE OF CONTENTS

SUMMARY	ii
I. INTRODUCTION	2
II. RECORD EVIDENCE DEMONSTRATES THAT DARS IS IN THE PUBLIC INTEREST.	7
A. Opponents Fail To Meet Their Burden Of Proof.	7
B. NAB's Comments Are Deficient And May Be Disregarded As Evidence of Economic Impact.	12
1. The NAB's Offer of Proof Must Be Considered In The Context Of A Robust And Thriving Radio Industry.	15
2. NAB Bases Its Conclusions On Faulty Analysis and Irrelevant Data.	17
3. NAB's Public Interest And Impact Analyses Are Based On Inaccurate Market Statistics.	22
C. DARS Provides Benefits That Far Outweigh Any Costs.	27
1. Public Oriented Service Will Increase.	27
2. Economic Effects on Local Radio Audiences and Revenues Are Overstated.	32
III. THERE IS NO JUSTIFICATION FOR REOPENING THE APPLICATION CUT-OFF OR EMPLOYING AN AUCTION TO ASSIGN LICENSES.	34
A. No Legal or Policy Justification Has Been Offered That Supports Reopening The DARS Cut-Off Window.	35
B. There Is No Legal Or Factual Justification Offered To Auction DARS Licenses.	38
C. Reopening The Cut-Off Window And Auctioning DARS Licenses Will Guarantee Delay.	39
IV. THE RECORD SUPPORTS ONLY MINIMAL TECHNICAL AND SERVICE RULES.	40
A. Minimal Service Regulations Will Benefit The Public Interest In Rapid Initiation Of A Flexible DARS Service.	41
B. Programming Obligations Are Unnecessary.	45
C. Minimal And Flexible Technical Regulations Will Permit DARS Operators To Offer A Robust, State-Of-The-Art Service.	47
V. CONCLUSION.	51

**Before the
Federal Communications Commission
Washington, D.C. 20554**

RECEIVED
OCT 13 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	IB Docket No. 95-91
)	GEN Docket No. 90-357
Establishment of Rules and)	RM No. 8610
Policies for the Digital Audio)	PP-24
Radio Satellite Service in the)	PP-86
2310-2360 MHz Frequency Band)	PP-87

**REPLY OF DIGITAL SATELLITE
BROADCASTING CORPORATION**

Digital Satellite Broadcasting Corporation ("DSBC"), by its attorneys, hereby submits its Reply to Comments concerning the *Notice of Proposed Rulemaking* in the above referenced proceeding.¹ The *DARS NPRM* proposes license assignment procedures and service and technical rules for the Digital Audio Radio Services ("DARS").

The opening comments, when viewed in light of the defects in the comments of the opponents of DARS, demonstrate that the public interest in plentiful and diverse radio services would be best served by the assignment of the full 50 MHz of spectrum allocated for DARS to the four pending applicants -- without reopening the filing window or employing competitive bidding. The record also shows that the promise of DARS would be best realized by the adoption of minimal and flexible service and technical rules designed to breathe life into, not suffocate, satellite DARS.

¹ *In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 60 FR 35166, FCC 95-229, Released June 15, 1995 [hereinafter *DARS NPRM*].

I. INTRODUCTION

The Commission received voluminous comments in response to the *DARS NPRM*. Those comments favor rapidly assigning to the four pending applicants, in 12.5 MHz blocks, the full 50 MHz allocated to DARS. Even more compelling than the number of comments in support is the wide variety of organizations that support immediate licensing of the current DARS applicants. Support was offered by technology companies,² public interest organizations,³ equipment manufacturers,⁴ program suppliers (commercial and noncommercial),⁵ educational organizations⁶, recreational associations,⁷ rural associations,⁸

² Comments of Diginet Communications, Inc.; Comments of IOTEX Communications Inc., Comments of Pandora Data Corporation; Comments of NIALl Enterprises, Inc; Comments of The Laboratory for the Interactive Future, Inc.; and, Comments of Multimedia Computer Communications, Inc.

³ Comments of Citizens for a Sound Economy and Comments of the Office of Communication of the United Church of Christ, (et al).

⁴ Comments of Orbital Sciences Corporation; Comments of Radio Order Corporation; Comments of Dolby Laboratories; Comments of Space Systems/Loral; Comments of Ball Corporation; and, Comments of Seavey Engineering Associates, Inc.

⁵ Comments of All Pro Sports and Entertainment, Inc.; Comments of National Cable Satellite Corporation (C-SPAN); Comments of National Public Radio, Inc.; Comments of Muzak, DBS Division; Comments of Voice of America; and Comments of Willow Mixed Media, Inc. (nonprofit educational media).

⁶ Comments of George Washington University; Comments of Northern Illinois University; Comments of the American Federation of Teachers; Comments of the American Association for Adult and Continuing Education; and, Comments of Learning System Architects.

⁷ Comments of the Recreational Vehicle Industry Association; Comments of the Winnebago-Itasca Travelers Association; and Comments of Mr. Robert Johnstone, J Boats, Inc.

⁸ Comments of Satellite Broadcasting and Communications Association of America ("SBCA"); Comments of the Owner-Operator Independent Drivers Association, Inc.;

ethnic entities,⁹ representatives of seniors and children's groups¹⁰, and even commercial and public broadcasters.¹¹

Parties supporting immediate licensing of the pending DARS applicants uniformly agree that DARS will serve the public interest by increasing choice and services. They recognize, quite correctly, that DARS will offer a variety of public interest benefits including: new services to unserved and underserved areas of the country;¹² new program services that will increase consumer choice across America¹³; nationwide service that will

Comments of the Wyoming Farm Bureau Federation; Comments of the American Council on Rural Special Education; and Comments of the Maine Farm Bureau Association.

⁹ Comments of the Foundation for the Advancement of Hispanic Americans; Comments of Festa Italiana; Comments of Council for the National Interest (Arab); Comments of Dialog and Confluence (Vietnamese); Comments of Native American Public Broadcasting Consortium; and Comments of the National Asian American Telecommunications Association.

¹⁰ Comments of the American Association of Homes and Services for the Aging; Comments of the New York Chinatown Senior Citizen Center, Inc.; and Comments of the Children's Miracle Network.

¹¹ Comments of KJAZ Satellite Radio (former niche broadcaster); Comments of WPFW (noncommercial FM radio station); Comments of Native American Public Broadcasting Consortium; and, Comments of Bell Broadcasting Company (seeking to uplink stations).

¹² Comments of SBCA at 3 (satellite services are an important communications link for rural consumers); Comments of the Owner Operator Independent Drivers Association (DARS will improve the quality of life of long haul truckers that are often outside the range of conventional radio reception); Comments of Mr. Robert Johnstone, J Boats, Inc. (audio transmission to boaters is intermittent).

¹³ Comments of the Wyoming Heritage Society; Comments of the American Satellite Television Alliance; Comments of the Recreation Vehicle Industry Association; Comments of the Winnebago/Itasca Travelers; Comments of Model Transit, Inc.; Comments of Citizens for a Sound Economy foundation; Comments of Office of Communication, The United Church of Christ, Et Al.; Comments of National Cable Satellite Corporation; Comments of National Public Radio.

reach rural areas¹⁴; niche programming that will reach unserved audiences¹⁵; and, public and emergency services¹⁶ that will be available when conventional broadcasting is not, *e.g.*, during a natural disaster.

Others support DARS based on its benefits to the nation's economy and competitiveness in high technology industries. Commenters in the programming and terminal manufacturing sectors confirm that DARS will stimulate demand for new program services and audio equipment, in turn creating jobs.¹⁷ The aerospace industry maintains that DARS will stimulate that manufacturing sector and will permit the U.S. to maintain its position as the world leader in high-tech industries and services.¹⁸

It comes as no surprise that the sole voice of opposition is the broadcast lobby. Yet again, they seek to avoid or delay the assignment of DARS licenses to applicants

¹⁴ Comments of Willow Mixed Media; Comments of American Federation of Teachers; Comments of Radio and Television Commission, Southern Baptist Convention.

¹⁵ Comments of Association of American Geographers; Comments of For My People; Comments of Italian Industries Association; Comments of Dialogue/Confluence; Comments of All Pro Sports and Entertainment, Inc.; Comments of Cedric R. Hendricks; Comments of The American Association for Adult and Continuing Education; Comments of Learning Systems Architects; Comments of Office of Communication, American Baptist Churches, USA.

¹⁶ United States Department of Agriculture, Forest Service; Comments of Robert Johnston, J Boats, Inc. (improved marine information and weather data transmission).

¹⁷ Comments of Dolby Laboratories, Inc.; Comments of Muzak, DBS Division; Comments of Orbital Sciences Corporation; Comments of Seavey Engineering Associates; Comments of Space Systems/Loral; Comments of Iotex Communications, Inc. and Comments of ComStream Corporation.

¹⁸ Comments of Loral Space Systems; Comments of Ball Aerospace; Comments of Orbital Sciences Corporation and Comments of Seavey Engineering Associates, Inc.

ready, willing, and able to initiate a new service.¹⁹ Assuming that the Commission will not heed their anticompetitive requests, these commenters propose DARS licensing and service rules that hinder development of this new service without any concomitant public interest benefits.²⁰ The "public interest analysis" offered by the National Association of Broadcasters, and other broadcast commenters, are merely anticompetitive delay tactics poorly disguised by public interest rhetoric.²¹

The NAB Comments are obviously and completely self-contradictory. First, they offer the illogical argument that DARS will be successful enough to siphon audience and advertisers from conventional radio. Yet, the benefits of DARS are too few to justify the costs. NAB next argues that DARS cannot be allowed because even a scintilla of competition from licensing the four pending applicants will create significant irreparable harm to conventional radio broadcasters. However, if DARS is allowed, the Commission should create as much harm as possible by reopening the proceeding for additional applications and license as many DARS service providers as possible (NAB proposes from

¹⁹ Broadcasters argue that any impact from DARS can not be tolerated, but, if the Commission intends to permit DARS it should be delayed until broadcasters have an opportunity to initiate digital systems. See, for example, Comments of Kirkwood Broadcasting, Inc.; Comments of Mt. Wilson FM Broadcasters, Inc.; Comments of Nobel Broadcasting Group, Inc.; and, Comments of WZLX-FM (Infinity Broadcasting Corporation of Boston).

²⁰ Broadcasters suggest that the Commission: develop content-based rules for DARS; adopt rules that will assure the survival of terrestrial broadcasters; limit DARS to subscription-only services; and, create a DARS licensing preference for existing broadcasters. See Comments of WBCN; Comments of WOMC; Comments of the New Jersey Broadcasters Association; and Comments of Susquehanna Radio Corp.

²¹ Comments of the National Association of Broadcasters (filed Sept. 15, 1995) [hereinafter "NAB Comments"].

10 to 19 licensees).²²

The Commission must view with a jaundiced eye the self-serving and deficient economic analyses offered by the NAB and the protectionist guidelines for DARS rules offered by it and its broadcast constituents. The objections raised by opponents are unavailing. The service rules and public interest obligations suggested by commenters are unnecessary. The draconian assignment procedures are illegal and inequitable.

The Commission has an extensive record supporting the immediate assignment of licenses of 12.5 MHz to each of the pending applicants. The DARS proponents have expended considerable resources and time developing DARS systems and service proposals, prosecuting their applications, and resolving difficult technical and licensing issues. These efforts were based on detailed technical and business analysis and motivated by the knowledge that agreements negotiated by the DARS applicants were confined to an immutable universe of DARS applicants. As a result of their activity over the past three years, the applicants have made DARS a reality on the verge of launch. These initiatives must be recognized and rewarded, not ignored and thwarted. The Commission must, without further ado, assign licenses to the pending applicants.

²² NAB claims that this result will "bring more diversity of viewpoint and business capability to the emerging DARS industry, and ultimately [] allow the marketplace to determine the most efficient uses of the DARS spectrum." NAB Comments at 9. If the Commission doubted that reopening and additional licensees will create delay and harm DARS, this "analysis" should be sufficient proof.

II. RECORD EVIDENCE DEMONSTRATES THAT DARS IS IN THE PUBLIC INTEREST.

The NAB again asserts, as it has over the past five years, that DARS will severely impact local radio stations in markets of all sizes across the country. As a result, stations everywhere will be required to cut back on local service in order to cut costs and remain viable. Thus, NAB concludes, authorizing DARS does not serve the public interest.

A. Opponents Fail To Meet Their Burden Of Proof.

Legal Requirements. As the Commission is well aware, any decision regarding the public interest effects of DARS must be made in the context of the Communications Act of 1934 ("Act") and firmly established Commission precedent. DSBC thoroughly discussed in its initial comments the key statutory and legal criteria by which the Commission must measure the public interest aspects of DARS:²³ 1) The Commission is required by the Act to encourage new technologies and services;²⁴ 2) the Act also instructs the Commission to make a wide distribution of services, not stations;²⁵ 3) opponents of a new technology or service bear the burden of demonstrating that the proposed service is inconsistent with the public interest;²⁶ and, 4) the Commission and the courts have placed a heavy burden on opponents to offer qualitative and quantitative evidence that a new service "will result in a substantial net reduction in services" and, therefore, is not in the public

²³ *Comments of Digital Satellite Broadcasting Corporation* (filed Sept. 15, 1995) at 26, hereinafter "Comments of DSBC."

²⁴ 47 U.S.C. §7.

²⁵ 47 U.S.C. §307.

²⁶ 47 U.S.C. §7.

interest.²⁷

The Commission must follow its own well-settled precedent, affirmed by the courts, when assessing the evidence submitted by the NAB and purporting to sustain allegations of competitive harm to conventional broadcasters and a lack of any offsetting benefits from DARS. In its decision authorizing the Direct Broadcast Service,²⁸ the Commission established a high hurdle to oppose a new satellite-based competitor to broadcasting. The Commission held that economic impact may be considered *only* if "**there is strong evidence that a significant net reduction in service to the public will result.**"²⁹ The Commission also concluded it could not refuse to authorize a new service "solely on the basis of speculative allegations concerning possible reductions in services from other sources" or "because its entry will reduce the revenues or profits of existing licensees."³⁰ These findings were easily upheld by the Court of Appeals for the D.C. Circuit which found that "existing systems, like existing licensees, have no entitlement that permits them to deflect competitive pressure from innovative and effective technology."³¹

Further, the Commission has concluded that it is no longer sound policy to consider

²⁷ *In Re Direct Broadcast Satellite, Report and Order*, 90 FCC 2d 676 (1982) [hereinafter *DBS Order*].

²⁸ *Id.*

²⁹ *DBS Order*, *supra* note --- (emphasis added). The new service must be ". . . likely to have a substantial adverse impact on local services." *Id.* at 1353-54.

³⁰ *Id.*

³¹ *National Association of Broadcasters v. FCC*, 740 F/ 2d 1190, 1198 (1984), *supra* note --. See also *Amendment of the Commission's Rules with Regard to the Establishment of New Digital Audio Radio Services*, 10FCC Rcd 2310 (1995) [*Allocation Order*], *supra* note --, para. 23.

the economic impact of new competitors on individual stations, no matter how large the economic injury to the station in question. In *Detrimental Effects of Proposed New Broadcasting Stations On Existing Stations*,³² the Commission held "private economic injury is by no means always, or even usually, reflected in public detriment. Competitors may severely injure each other to the great benefit of the public."³³

It is well settled that the Commission acts upon allegations of harm only when so many stations are effected that the industry as a whole is adversely impacted *and* the public suffers a substantial net loss of services. Thus, there is a two-step, conjunctive burden of proof. First, opponents must adduce "strong evidence" of an adverse impact directly attributable to the new entrant. Second, they must demonstrate that the public would suffer a "substantial net decrease" in services, adding the new services being offered after subtracting any services predicted to be lost. Only then may the Commission consider whether a regulatory response is warranted.

Statutory and Commission Policy Framework. The *DARS NPRM* quite properly recognizes that this burden must be considered in light of the Commission's Section 7 mandate to promote new services and technologies. Section 7 declares that: "it shall be the policy of the United States to encourage the provision of new technologies and services to the public."³⁴ The Act also unambiguously assigns the burden of proving that new technologies, new services and expanded consumer choice are contrary to the public

³² 3 FCC Rcd. 638 (1988), *recon.* 4 FCC Rcd. 2276 (1989).

³³ *Id.* at 587 (citing *Carroll Broadcasting v. FCC*, 258 F.2d 440, 443 (D.C. Cir. 1958)).

³⁴ 47 U.S.C. §157.

interest:

any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.³⁵

The Commission has appropriately stressed that the public interest in the instant case is the protection of competition, not competitors. Thus, the economic impact of DARS is relevant to the public interest analysis only "to the extent that such impact would predictably lead to serious loss of important services to consumers . . ."³⁶ Moreover, this analysis must not occur in a vacuum but must consider the continuing liberalization of radio regulations and increasing service and revenue opportunities for broadcasters.³⁷

Thus, both Commission precedent and Congressional mandate make clear the standard of proof that opponents of DARS face. The Commission must follow its own well established criteria, affirmed by the courts, regarding the evidence necessary to sustain allegations of competitive harm to the terrestrial broadcasting industry.

The DARS NPRM further illuminates the quantitative and qualitative nature of the evidence the Commission seeks in this proceeding to assist its economic and public interest

³⁵ *Id.*

³⁶ *DARS NPRM, supra* note 1, para. 11.

³⁷ *Id.* Presumably this includes new growth opportunities in the form of in-band on-channel digital audio broadcasting as well as radio broadcast data systems ("RBDS"). The wireless data market in which broadcasters could participate through RBDS is expected to grow to almost \$1 Billion by the end of the decade. *Digital Audio Broadcasting: Phase I, prepared for the Corporation for Public Broadcasting, Bortz & Company, Inc., (Mar. 4, 1993) at 114-115, 119-121.*

inquiry.³⁸ The Commission is primarily interested in the effect of DARS on the overall level and quality of services available to the public. It inquires whether DARS will negatively impact terrestrial radio listening and whether any such effects will be mitigated or entirely offset by DARS attracting new listening audiences and creating new economic welfare.

The Commission noted that broadcasters often argue that DARS will result in some audience diversion that causes a diminution of broadcaster revenues. They aver that reductions in station revenues, in turn, may create financial pressures on stations, which may lead broadcasters to cut back on "local" programming, reducing service to the public. As a result, the Commission specifically directed commenters to discuss the various aspects of local programming: its availability; the costs entailed in producing it; and, whether the provision of such programming is profitable for broadcasters.

Because the viability of a radio station is determined by a variety of factors, commenters are required to establish a credible connection between the advent of DARS competition some three to five years hence and any predicted impact on radio station viability and other asserted "harms." The Commission instructed that both the potential and the likelihood of such harms must be addressed.

The Commission also noted that any impact need not be either substantial or unavoidable, given the resources and resourcefulness of the radio broadcasting industry. In

³⁸ The Commission's request for information is specific with respect to data, methodologies, assumptions, figures of merit, and relevant variables. The *DARS NPRM* also contains precise specifications of the value and weight to be accorded various components of the public interest, while admonishing commenters not to rely on self-serving claims, unsupported assumptions and assertions that cannot be verified or refuted by traditional forms of analysis.

particular, the Commission recognized that broadcasters may be able to deflect, or otherwise reduce, any potentially harmful impacts by their competitive reactions.

Although the competitive entry of a new audio service provider may cause some harm to some broadcasters, it is also likely to create new benefits or value for others by creating new choices and expanding the range of available services. Thus, the Commission clearly stated that *it does not equate incumbent broadcaster interest to the public interest*, inasmuch as consumers may be better off in the aggregate. It reiterated that harm to broadcasters is relevant only to the extent that such harm translates to substantial harm to consumers.

The Commission's current inquiry is directed toward evaluating the total of these impacts and assessing the balance on the public interest, while always maintaining the primacy of the welfare and interests of consumers, not those of incumbent broadcasters. Considering the burden established by Section 7 of the Act, the DBS decision as affirmed by the court and illuminated in the *DARS NPRM*, and the unique characteristics of the radio industry, the Commission has no alternative but to ignore NAB's oft-repeated, and unsupported, claims that DARS may not be authorized because it may inflict some harm on broadcasters. DSBC here summarizes the failure of the NAB to come forward with any credible evidence of negative economic impact from DARS or a net reduction of services available to the public.

B. NAB's Comments Are Deficient And May Be Disregarded As Evidence of Economic Impact.

In spite of the physical heft of the NAB pleading, it is devoid of credible qualitative or quantitative evidence demonstrating that DARS will result in a "significant net reduction in service to the public," or any similar consequence, to the broadcast industry as a whole.

NAB offers an anecdotal study that purports to show the perspective of broadcasters on localism and the adverse impact DARS will have on local communities and listeners.³⁹ It submits lists of stations and formats in markets and counties across the country, in an attempt to demonstrate the quantity and universal availability of conventional and niche programming to all Americans.⁴⁰ NAB also strives to estimate audience diversion resulting from DARS⁴¹ and offers an analysis of the economic impact on local radio stations from that diversion -- many stations in large markets will have to trim their profit margins and small stations and stations in small markets will become unprofitable.⁴² Yet again, the NAB submits a study, yellow with age, to demonstrate that stations in all markets, and the industry as a whole, are suffering, rather than healthy, as a general matter.⁴³

³⁹ "Local Perspectives on Localism in Broadcasting and the Adverse Impact of Satellite DARS," NAB Comments, Attachment 1 ("SPR Study").

⁴⁰ "An Analysis of the Number of Radio Stations in Arbitron Markets," NAB Comments, Attachment 2; "1995 Radio Station Availability by County Study," NAB Comments, Attachment 3; "An Analysis of the Number of Formats Offered in Arbitron Markets," NAB Comments, Attachment 4; "Stations with Spanish Formats," NAB Comments, Attachment 11; "Stations With Programming in Languages Other Than English or Spanish" and "Number of Stations With Foreign Language Programming," NAB Comments, Attachment 12A and 12B.

⁴¹ "Estimating the Audience Diversion From Broadcast Radio by the Introduction of Satellite Digital Audio Radio Service (DARS)" NAB Comments, Attachment 5 ("ORS" or Opinion Research Study").

⁴² "The Economic Impact of Satellite-Delivered Radio on Local Radio Stations," Prepared by Kagan Media Appraisals, Inc. (hereinafter "KMA" or "KMA Study") NAB Comments, Attachment 9; Miller, Kaplan, Arase & Co. (hereinafter "MKA"), NAB Comments, Attachment 14.

⁴³ "Radio Station Financial Picture," NAB Comments, Attachment 13.

The comments and studies submitted by NAB⁴⁴ and intended to prove its case regarding detrimental effects of DARS, are rife with unexplained assumptions regarding the competitive effects of DARS, rely on outdated financial data and invalid models, and generally fail to answer the Commission's requests for information. Each study: relies on speculation, not evidence, to support critical assumptions; interprets station and format data to support the broadcaster's position while ignoring accurate but contradictory information; and, submits opinions and DARS adoption scenarios that favor DARS proponent's positions. To the extent that financial data is submitted it is out of date and contradicted by the current, and typical, state of the industry. Moreover, the financial analysis based on this data necessarily results in conclusions that overstate the effects DARS will have on the conventional broadcasting industry.

The cumulative impact of the NAB's contortions to prove the unprovable -- detrimental impact on broadcasting and consumers -- is negligible, at best. The NAB's comments and studies should be given little, if any, weight in the Commission's deliberations regarding DARS service. They certainly fall far short of the burden established by precedent and statute and fail to offer the information requested in the *DARS NPRM*. As a direct means of evaluating the extent to which the NAB's Comments meet the evidentiary and

⁴⁴ While many broadcasters filed comments, they generally parrot the NAB position. The common theme among them is that DARS must be stopped or heavily regulated, otherwise the Commission risks eliminating the local public interest programming they provide. Another common aspect is the absence of evidence that DARS will have any such effect.

informational burden imposed DSBC offers an evaluation of the these attachments.⁴⁵

1. The NAB's Offer of Proof Must Be Considered In The Context Of A Robust And Thriving Radio Industry.

As anticipated in DSBC's Comments, the NAB relies on 1991 recessionary data reported in its *1992 Radio Financial Report* and claims that they are the most recent figures available.⁴⁶ These outdated and irrelevant figures generally demonstrate an industry in distress, which is not ordinarily, or currently, the state of radio.

All indicators (station trades, cash flow multiples, margins, advertising revenues) and comments by industry leaders (including the NAB's own President) point to a different conclusion.⁴⁷ Radio has just completed it 36th month of uninterrupted revenue growth. Ad dollars are up 8% in August 1995 over the same month in 1994. Local advertising revenue was up 9%. Year-to-date revenues are up 10%.⁴⁸ Moreover, the average price of radio stocks

⁴⁵ The heart of the NAB's case is presented in Attachments 5, 9 and 14. The arguments, analyses and data presented in these attachments offer somewhat more credible information but are, nevertheless, amenable to refutation and differing interpretations. Accordingly, they are analyzed and critiqued in some considerable detail in Appendix A, attached hereto. All other Attachments are addressed below.

⁴⁶ NAB Comments at 32; SPR Study at 41, note 54; Radio Station Financial Picture at 1.

⁴⁷ The importance of this proceeding, and the Commission's request for a detailed and current financial picture of the radio industry would seem to support updating available industry information. NAB obviously does not agree, perhaps fearing that the evidence would show an exceptionally healthy industry. In fact, a study by the Corporation for Public Broadcasting relying, in part, on the same data as the NAB concluded that "satellite and/or other subscription-based DAB services will pose relatively little threat to commercial radio broadcasters. These services appear likely to evolve as niche products serving audiophiles and underserved listening populations." Trautman, James M., Paul Bortz et al., *Digital Audio Broadcasting: Summary Report*, prepared for the Corporation for Public Broadcasting, Bortz & Company, Inc., May 1994.

⁴⁸ Communications Daily, Oct. 5, 1995 at 9.

is up 46% in the first half of 1995, well above the market average of 26%,⁴⁹ and station trades in 1994 exceeded 1993 by \$2 billion for a 1994 total of \$5 billion. These trends are expected to continue. Even with DARS on the horizon, stock values and advertising are performing well. Since the Commission allocated spectrum for DARS in January one group of publicly traded radio "pure-plays" is up 75%.⁵⁰ In addition, advertisers are being lured to radio from other media and radio is considered well positioned to serve new advertisers.⁵¹

That a healthy radio broadcasting industry is the norm and will be unaffected by DARS was confirmed by the President of the National Association of Broadcasters. In a recent speech he concluded that the advent of competition from new technologies will not be the "death knell for radio" because of radio's strong relationships with its audience. "As long as we provide the public with relevant programming I predict America's love affair with radio will only be enhanced."⁵² This view is confirmed by Chairman Hundt who recently remarked that "radio is a very strong industry doing very well economically."⁵³ He has also remarked that "[w]e should let DARS compete with terrestrial. Every instinct tells me that the results of that competition will be better radio service for the American public. And there is no

⁴⁹ "Radio Stocks Flourish in First Half" *Broadcasting & Cable*, July 10, 1995 at 35. This result is attributed to strong advertising revenue, lower interest rates and deregulation.

⁵⁰ "Radio Frenzy Brings Riches" *Wall Street Journal*, Sept. 17, 1995.

⁵¹ "Newspapers Loss May Be Radio's Gain" *Broadcasting & Cable*, May 15, 1995; "Advertisers Expected to favor Radio In 1995," *Broadcasting & Cable*, Mar. 20, 1995.

⁵² Remarks of Eddie Fritts, Radio 95, Sept. 7, 1995. He also commented that radio "has evolved and thrived in the face of competition that would have felled others."

⁵³ "Hundt: Radio Is Strong," *Radio World* August 23, 1995.

reason to assume that radio will do poorly in this competition."⁵⁴

Despite NAB's conviction that radio is struggling to survive, it can not change the facts that demonstrate it is a financially robust industry now, has been historically, and will continue to be. The financial health of radio undercuts all of NAB's arguments and studies because they are based on an anomaly -- the financial malaise suffered by radio, and most other industries, in the early 90s.

2. NAB Bases Its Conclusions On Faulty Analysis and Irrelevant Data.

The Strategic Policy Research Study. One of NAB's analysts, SPR, submits a study that consists of a set of six case studies of individual small-town radio markets located around the country.⁵⁵ SPR interviewed the general managers of stations serving the markets as well as local civic leaders and advertisers. The purpose is to present the information on the operating conditions that "prevail in the commercial radio industry," the role local stations play in their communities, and the potential impact of satellite DARS on local, community-oriented radio service. The study purports to show that local radio markets are highly competitive and provide listeners with a broad array of program choices of a local nature. Study participants "perceive" that the implementation of DARS will compel efforts to economize on programming costs by becoming conduits for national or regional program services with less local involvement, thus, creating negative effects on the community.

⁵⁴ Reed E. Hundt, Speech before the NAB Radio Show at 8 (September 8, 1995).

⁵⁵ The selection of these markets was based on the fact that they are geographically dispersed and "in our opinion (informed by our travels there), provide a good cross-section of small-town America." Small markets were selected because it is the type of market in which SPR "believes" the local role of radio is most easily portrayed and where the consequences of contemplated change are likely to be most apparent. SPR at 6.

Moreover, the information regarding format and station availability in the markets are provided in anecdotal form only by parties with vested interests in the status quo, *e.g.*, general managers of the local radio stations. *Conspicuous by their absence are any interviews with actual listeners in the market* and an analysis of their view of local competition, station and format availability. In fact, of the 350 plus pages comprising NAB's Comments, the NAB devotes less than two dozen pages to discussing listeners tastes, needs, and desires.⁵⁶

The SPR study can be discounted or dismissed for several reasons. It relies on a limited sample size (six markets) and sampling method (nonprobability sample, subject to bias) that prohibits any conclusions from being predictive of the industry as a whole. Moreover, the markets selected by SPR are so economically fragile that any failure of a local radio outlet can not be ascribed to DARS. The SPR Study portrays markets in which retail turnover and resulting negative impact on local advertising revenues is fueled by variables distinct and separate from DARS.⁵⁷ While these testimonials provide insight to the reasons

⁵⁶ Opinion Research Study, NAB Comments at Attachment 5. This is typical of NAB's approach to this entire proceeding. It focuses only on the economic impacts on radio broadcasters and ignores the final, yet most important, piece of the analysis -- the services available to consumers. DSBC hastens to emphasize the Commission's explicit admonition that the public interest, not broadcaster's interest, is the proper point of reference for evaluating the effects of DARS. Although NAB would have the Commission concentrate exclusively on the effects on broadcast stations, the Commission's analysis must be much broader.

⁵⁷ The markets selected by SPR are marked by lingering effects of the nationwide recession and are all dependent on natural resource commodities. None has a significant manufacturing base that would assist the weathering of adverse economic conditions. For example, Morgan City, LA, was hit hard by the down cycle of the oil industry resulting in a large population loss. Enid, OK, suffered a similar fate. (Combination of SPR Study and Chamber of Commerce Data). Most of these markets also have unemployment rates significantly higher than the national average. "[T]he local retail base has declined. . . I don't think New England is entirely out of the recession. A lot of the small retailers who were

for deteriorating advertising revenue base in these markets, no evidence is offered to indicate that this is the situation throughout radio markets in America or that DARS has, or will have, any effect on the dollars devoted local advertising.

SPR admits that its examination of economic impact includes analysis of neither the market potential nor the technology diffusion rate for DARS because such an analysis would, of necessity, "be speculative and involve a certain, irreducible degree of uncertainty."⁵⁸ SPR substitutes unsupported conjecture, casual empiricism and theoretical musings for concrete analysis. Instead, the SPR Study begs the main questions -- the real world impact of DARS on the public interest -- and does so admittedly and explicitly:

Economic theory provides a fully adequate basis for making qualitative predictions about the likely competitive impact of DARS Our theoretical analysis affords a basis for a qualitative assessment of the kinds of impacts to be expected from DARS implementation. How strong these impacts will be depends, in part, on how successful DARS turns out to be. We would note, however, that given the apparent willingness of DARS suppliers to invest substantial sums of money to capitalize the service, it is both reasonable and prudent for the Commission to premise its evaluation of the likely impact of DARS on the assumption that the new service will achieve significant market penetration and exert a significant impact on the economics of terrestrial radio broadcasting.⁵⁹

In other words, the fact that entrepreneurs are willing to invest in a business enterprise is a sure indicator of its potential for success. In place of the economic analysis requested in the *DARS NPRM*, SPR simply *advises* the Commission to assume that the effects of DARS will be substantial.

destroyed by the recession have left the area." Comments of Jeff Fisher, General Manager, WFTN, SPR Study at 63.

⁵⁸ SPR Study at --.

⁵⁹ NAB Comments, Attachment 1, SPR Study at 5.